NO. 20325

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

# APPELLEE'S BRIEF

---

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

---

FILED
FEB 4 1966
WM. B. LUCK, CLERK

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 20325

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

---

# APPELLEE'S BRIEF

---

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

---

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

# TOPICAL INDEX

# TABLE OF AUTHORITIES

NO. 20325

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD T. LYNCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

# APPELLEE'S BRIEF

---

## I

## JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California denying appellant's motion to vacate judgment and sentence under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. This Court has jurisdiction under Title 28, United States Code, Sections 1291, 1294 and 2255.

## II

## STATEMENT OF THE CASE

Appellant was charged with robbery of a savings and loan association and assault under Title 18, United States Code, Section 2113 [Ex. A, pp. 2-4, 6]. [1] He entered a guilty plea in the Southern Division of the Southern District of California on September 25, 1961 [Ex. A, pp. 1-4].

On October 16, 1961, appellant was sentenced to the custody of the Attorney General for a period of ten years (Ex. A, pp. 8, 16].

On June 17, 1964, appellant filed a motion to vacate judgment and sentence under Title 28, United States Code, Section 2255 [T.R. 13-32]. [2] The hearing upon appellant's motion commenced on October 26, 1964, before United States District Judge Jacob Weinberger [T.R. 57-58]. The motion was denied on November 18, 1964 [T.R. 68].

## III

## ERRORS SPECIFIED

Appellant's brief, dated December 17, 1965, raises the following points upon appeal:

1. Statements by the prosecuting attorney to appellant's

---

[1] "Ex. A" refers to Defendant's Exhibit "A".

[2] "T.R." refers to the Transcript of Record.

[illegible]

## [illegible]

[illegible]

[illegible]

## [illegible]

[illegible]

[illegible]

counsel allegedly violated appellant's Constitutional rights.

2. Alleged ineffectiveness of appellant's counsel in violation of the Fifth and Sixth Amendments of the United States Constitution.

## IV

## STATEMENT OF THE FACTS

Appellant entered a guilty plea on September 25, 1961, to a charge of robbery of a savings and loan association and assault [Ex. A, pp. 2-4, 6].

On June 17, 1964, appellant filed a motion to vacate sentence and conviction [T.R. 13-32]. An earlier motion in the same proceeding was apparently filed on February 28, 1964 [T.R. 16].

The hearing upon the motion of June 17, 1964, commenced on October 26, 1964 [T.R. 57-58]. The testimony received at that hearing is not part of the record upon appeal herein.

The trial judge entered findings of fact regarding the evidence produced at the said hearing, including the following:

> "Pierce M. Kavanagh, Esq. [appellant's counsel at the time of the guilty plea], graduated from law school in 1955, then went into the Coast Guard Service where he remained for three years with the rank of Lieutenant, J.G. During his period of service, Mr. Kavanagh represented military accused, served on Boards of Investigation and Boards of Inquiry. He was admitted to practice law in the State of New York, then for a year acted as Law Clerk in

the office of a Los Angeles attorney whose practice was almost exclusively criminal, and was admitted to practice law in all the Courts of California and in the United States Courts of this District in June of 1961. . . . "

"Mr. Kavanagh . . . discussed the case with the Assistant United States Attorney in Charge at San Diego, Mr. Elmer Enstrom, Jr., and the latter showed Mr. Kavanagh the United States Attorney's file with reference to the case, including the F. B. I. report. No arrangement for any 'deal' or recommendation for a particular sentence was discussed between Mr. Kavanagh and the United States Attorney. At a subsequent discussion Mr. Kavanagh indicated to petitioner that he understood the average sentence was five years, but stated that neither the Court nor the United States Attorney would make any commitment about what sentence might be given, and that petitioner might receive the maximum sentence; Mr. Kavanagh mentioned to petitioner that the file contained a confession of the co-defendant; that there was eye-witness testimony; that the bills recovered from petitioner were marked. Petitioner admitted to counsel his full complicity in the robbery. . . . Mr. Kavanagh did not, in any manner, indicate to petitioner that he would receive five years, or any particular period of time as a sentence if he pleaded guilty, and did not indicate to petitioner that the United States Attorney had made a statement that petitioner would

receive any particular sentence; that at the time of such latter conversation, petitioner stated he wished to plead guilty." [T.R. 63-64].

The trial judge also noted that petitioner stated, at the time of the guilty plea, that he had not been influenced to plead guilty and that no promise or suggestion had been made that the Court would give him any lighter sentence or other consideration because of the guilty plea. The trial judge also noted that appellant stated: "I pleaded guilty because I am guilty." [T.R. 64-65].

The trial judge concluded that appellant's guilty plea was free from misrepresentation "on the part of any person" and that "petitioner was adequately represented by competent counsel in the criminal proceedings." [T.R. 67].

## V

## ARGUMENT

### A. No Statements By The Prosecuting Attorney Violated Appellant's Constitutional Rights.

Appellant argues that the prosecuting attorney promised appellant's attorney a five-year sentence for appellant if he would plead guilty and 55 years if he would not plead guilty.

The record does not support this claim. The testimony received at the hearing of the motion in question is not part of the

record herein. [3] However, appellant's brief quotes portions of the testimony which tend to refute his claim of promises and threats:

> Attorney Kavanagh's testimony:
>
> "I believe I indicated to Mr. Lynch that the average time was 5 years, but that the U. S. Attorney or the Court wouldn't commit themselves, and he could get the maximum." (Appellant's Brief, p. 28, emphasis added).
>
> "I asked Mr. Enstrom what the average time on a plea such as this and I don't recall whether it was the average time for commitment, but as best I recall, Mr. Enstrom said 5 years is average." (Appellant's Brief, p. 24).

Appellant concedes that the latter statement is "the closest we can come" to an admission of the existence of the alleged five-year promise (Appellant's Brief, p. 24).

As appellant notes, there was a conflict in the evidence at the hearing. The trial court decided the issue against appellant after hearing the evidence. The trial court was not required to accept appellant's version of the events in question. Where the evidence is conflicting, a finding of fact by the trial court must be upheld upon appeal.

---

[3] Appellant states that he mailed transcripts of all proceedings to the Clerk of the Ninth Circuit Court of Appeals on July 23, 1965 (Appellant's Brief, p. VI), so a copy might be available to the Court. In any event, we have mailed a copy of the Transcript to the Clerk of the Court for the Court's perusal.

Wilson v. United States, 100 F. 2d 552, at 555
(9th Cir. 1938).

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Federal Rules of Civil Procedure, Rule 52(a).

Findings of fact shall not be set aside unless "clearly erroneous."

United States v. Oregon Med. Soc.,
343 U.S. 326, at 332 (1952);

Jensen v. United States, 326 F. 2d 891, at 893
(9th Cir. 1964),

"This rule applies likewise to all reasonable inferences of the trial judge."

Hearn v. United States, 194 F. 2d 647, at 649
(7th Cir. 1952), cert. denied,
343 U.S. 968 (1952).

An appellate court does not have time to retry the issues of fact whenever a litigant is disappointed by the decision in the trial court, nor does it have an opportunity to observe the demeanor of the witnesses, their tones of voice, and their gestures.

" 'Face to face with living witnesses the original trier of facts holds a position of advantage from which appellate judges are excluded . . . . How can we say the judge is wrong? We never saw the witnesses. . . . ' "

United States v. Oregon Med. Soc., supra, 343 U.S.

326, at 339, quoting Boyd v. Boyd,
169 N.E. 632.

It has been stated that the " 'best and most accurate record' " upon appeal " 'is like a dehydrated peach.' " A witness may be impeached by his own demeanor.

Broadcast Music v. Havana Madrid Restaurant Corp.,
175 F.2d 77, at 80 (2nd Cir. 1949).

Although the finding of fact may be set aside if clearly erroneous, there is no evidence before this Court providing an opportunity to study the evidentiary basis for the findings.

> "No claim that a finding is not supported by the evidence can be sustained where, as herein, the evidence is omitted from the record on appeal. In such a case the trial court's findings are presumed to be supported by the evidence, Canal Bank v. Hudson, 111 U.S. 66, 81, 4 S.Ct. 303, 28 L.Ed. 354, and cannot be set aside, Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A. following section 723c."

Griffiths Dairy v. Squire, 138 F.2d 758, at 760
(9th Cir. 1943).

> "The record does not disclose that the defendants preserved all of the testimony of the witnesses, and since the findings of the court are based on evidence which is not in the record before us, we must accept the finding as correct."

Carter Oil Co. v. Norman, 131 F.2d 451, at 456

(7th Cir. 1942) (The same rule appears in Jensen, supra, at 893).

It does not appear, however, that appellant has been prejudiced by his lack of knowledge of this rule, for his own brief clearly demonstrates that there was a conflict of evidence in the trial court (Appellant's Brief, pp. 21, 24, 28). Appellant merely asks this Court to disbelieve Attorney Kavanagh and to believe appellant.

Appellant had the burden of proof to establish his claim by a preponderance of the evidence.

Hearn v. United States, supra, 194 F. 2d 647, at 649.

The trial court's finding that he failed to meet the burden of proof was not "clearly erroneous".

## B. The Trial Court's Finding That Appellant Was Adequately Represented By Competent Counsel Should Be Upheld Upon Appeal.

Appellant contends that his representation by counsel was ineffective. The trial court found that appellant was adequately represented by competent counsel in the criminal proceedings [T.R. 67].

Here again, the finding of the trial court should not be set aside unless clearly erroneous.

United States v. Oregon Med. Soc., supra.

Here again, the evidence received at the hearing does not appear in the record, so the findings of fact are presumed to be

supported by the evidence.

Griffiths Dairy v. Squire, supra.

Furthermore, the facts contained in appellant's brief do not support a claim of ineffectiveness of counsel.

Appellant states that after the robbery officers were looking for a suspect clothed differently than appellant was clothed when arrested. This is not particularly important, as the robber might have decided to change clothes and remove sunglasses after the robbery.

Appellant contends that Attorney Steward told him that he could get appellant released upon search and seizure grounds, but appellant admits that Attorney Steward testified that he may have told appellant that a search and seizure question could properly be "raised" (Appellant's Brief, pp. 2, 36).

Appellant states that co-defendant Gallant, when he implicated appellant, was without counsel and possibly misled by the Federal Bureau of Investigation. There does not seem to be anything in the record supporting this claim.

Appellant states that Attorney Kavanagh told him that the prosecuting attorney informed him that a not guilty plea would not go well with the Court, that he would get only 5 years if he pleaded guilty, and that he would receive 55 years if convicted. However, appellant admits that Kavanagh wrote that he did not remember any specific statement by the United States Attorney and that the latter may have stated that the average sentence was 5 years (Appellant's Brief, p. 9).

The fact that Kavanagh may have conferred with the prosecuting attorney does not tend to establish that promises or threats were made. It is a normal procedure for defense counsel to attempt to seek interviews with prosecutors for the purpose of ascertaining the strength of the prosecution case. The fact that co-defendant Gallant may have heard something about 5 years and 55 years does not establish that threats or promises were made. Neither does the fact that Attorney Wiggins testified that he was surprised at the 10-year sentence establish that there was a promise of 5 years, for appellant concedes that Wiggins testified that he would not have been surprised at a 6-year sentence (Appellant's Brief, p. 16).

Appellant complains that Kavanagh made no independent investigation of the facts, although he was told that alleged eyewitnesses were not positive in their identification. However, appellant admits that Kavanagh looked at the United States Attorney's file, according to the testimony (Appellant's Brief, p. 21). Appellant also concedes that Kavanagh testified that appellant confessed his guilt to Kavanagh (Appellant's Brief, p. 29).

Appellant states that Kavanagh admitted that he tells every appointed defendant to plead guilty. However, this is a conclusion drawn by appellant from ambiguous testimony (Appellant's Brief, p. 39).

Although appellant's arguments are frivolous in the absence of any record of the testimony received at the time of the hearing in question, a number of his contentions have been discussed in

this brief in order to demonstrate that appellant, a layman, was not prejudiced by his lack of knowledge of appellate procedures. It is clear from his brief that his appeal has no merit because it merely involves disputed questions of fact resolved in the trial court.

## VI

## CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

# CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON